IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.970 of 1989

Mohamed Issaque
since deceased by his heirs
and legal representatives :

1. Smt.Jaisabi Mohamed Ishaque
2. Shri Mohamed Mukhtar
3. shri Mohamed Akhtar
4. Kumari Shahenaz Banu ..Appellants

(Heirs of orig.deft no.1)

V/s

1. Smt.Nargesh Dhanjishaw Jasoomani
2. Shri Yazdi Dhanjishaw Jasoomani
3. Shri Aspi Dhanjishaw Jasoomani
4. Porai Rustamji Basta
since deceased through his legal
heirs and representatives:
4a. Mrs.Banu Porsi Basta
4b. Pharoah Porsi Basta
5. Shaukat Ali Isimdar
since deceased through his legal
heirs and representatives:
5a. Mariyambee Shaukat Ali
5b. Abid Ali Shaukatali

5c. Rashid Ali Shaukat Ali

5d. Aaquilla Khatun Azis Ahmod

5e. Sadiqa Khatun Wakil Ahmed ..Respondents

Shri V.Z.Kankaria for Appellant

Shri K.AS.Irani for Respondent nos.2 and 3

Mr.N.Y.Mhatre for Respondent no.4(a)

Shri A.R.Shaikh for Respondent no.4b,5(a) to 5(e)

WITH

FIRST APPEAL NO. 831 of 1989

Shaukat Ali Isimdar

since deceased by his heirs and

legal representatives

1a. Mariyambee Shaukat Ali

1b. Abid ali Shaukat

1c. Rasheed Ali Shaukat Ali

1d. Aquilla Khatun Ab Aziz

1e. Sadiqua Khatun Wakil .. Appellants

V/s

1. Nargesgh Dhunjishaw Jassumani

2. Yadi Dhunjishaw Jassumani

3. Aspi Dhunjishaw Jassumani

4a. Mrs.Banu Percy Basta

4b. Dr.Paroach Percy Basta

5. Mohammed Issac

since deceased through his L.Rs.

5a Jaisabi Mohammed Issac

5b Mohammed Mukhtar Mohd.Issac

5c Kum.Shakunaz Bano Mohd.Issac

5d Mohammed Akhtar Mohd.Issac .. Respondents

Shri A.R.Shaikh for Appellants

CORAM:S.R.SATHE,J.

DATED:27th Feb. 2006

ORAL JUDGMENT :-

1. The appellants, original defendants in S.C.Suit No.4411 of 1964 have preferred this appeal against the judgment and order passed by the City Civil Court, Bombay whereby the plaintiffs' suit for possession of the suit property was decreed in plaintiffs' favour. For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

2. Brief facts giving rise to these two appeals are as under :

. The original plaintiff purchased the suit property i.e. open plot situated at Kondivita village, Andheri Kurla Road,Bombay bearing Survey NO.34 Hissa no.2

admeasuring 1270 sq.yds. by virtue of registered sale deed dated 12-9-1949 and was put in possession of the said property. In February 1984 he decided to sell the said property to one Wasvani and as such both of them visited the suit plot which was completely vacant at that time. An agreement to sell was therefore executed between the original plaintiff and Waswani and it was agreed to hand over possession to Waswani by the end of April 1964. On or about 10th March 1964 Waswani noticed certain structure having been put up on the said land. He therefore reported the matter to the original plaintiff. Naturally plaintiff immediately visited the suit land. He also found that some structures with pillars were put up and some shabby material was lying on the land. The defendant no.1 who was present there told plaintiff that he occupied the suit land about 10 days back after paying premium to the original defendant no.2 Mohammad Rajak. The plaintiff asked defendant no.1 to vacate the land but he refused. Plaintiff therefore reported the matter to the Police. Subsequently, the defendant no.1 filed suit contending that he was the tenant of the defendant no.2 and plaintiff obstructed his possession. He, therefore, sought injunction against the plaintiff. When the said suit bearing suit No.1427 of 1969 came up for hearing, the original plaintiff gave undertaking that he would not dispossess the defendant no.1 otherwise than due process of law. The defendant no.1 therefore withdrew the said suit.

3. According to the plaintiff the defendant nos.1 and 2 had absolutely no right, title or interest in the suit property and they were totally strangers to the suit property. As the defendant nos.1 and 2 were trespasser in the suit land plaintiff filed suit for possession against the defendants and also prayed for permanent injunction as well as appointment of Receiver.

4. The defendant no.1 filed his written statement and submitted that he has no knowledge about the alleged agreement between the plaintiff and Waswani. On the contrary he contended that he is in the suit premises pursuant to the agreement of tenancy between him and the defendant no.2 executed on 1-2-1961. He also denied the allegation that the defendant no.2 was a stranger to the suit land. He contended that the defendant no.2 claimed ownership over the suit land by way of adverse possession and even plaintiff was aware of the said fact. Not only that defendant no.2 had also entered into similar agreements of tenancies in respect of remaining portion of land out of the said survey number and name of the defendant no.2 was entered in the record of rights. The defendant no.1 also contended that he is in area of 42’ x 90’ and paying rent of Rs.30/- per month to the defendant no.2. Thus, according to the defendant no.1 plaintiff was not entitled to file present suit. He, therefore, prayed for dismissal of the suit.

5. During the pendency of the suit the original

plaintiff expired and his heirs i.e. plaintiff nos.1 to 3 were brought on record and necessary amendment was carried out in the plaint.

6. The defendant no.1 filed his additional written statement and contended that plaintiffs should prove that they are the legal heirs and representatives of original plaintiff.

7. As the plaintiff nos.1 to 3 sold the suit property to the plaintiff no.4 and as such he was impleaded in the suit and necessary amendment was carried out. The defendant no.1 contended that as plaintiff nos.1 to 3 had no valid title to the suit property the alleged sale deed in favour of the plaintiff no.4 is not legal and valid and plaintiff no.2 is not the owner of the suit property. The defendant no.1 also contended that the defendant no.2 has expired on or about 1968 and his heirs have not been brought on record. He, therefore, contended that right to sue against him does not survive and the suit is liable to be dismissed.

8. The defendant no.1 also contended in the alternative that suit property is an agricultural land the defendant no.2 was cultivating the said land. As per record of rights and as per provisions of Maharashtra Agricultural Lands tenancy Act, (probably he wanted to say Bombay Tenancy and Agricultural Lands Act), the said defendant no.2 had become the owner of the suit property and

therefore he was entitled to let out the suit property. The defendants therefore contended that the suit be dismissed.

9. From perusal of the record it appears that defendant no.2 did not appear in the suit though duly served. Subsequently when the question arose about bringing the legal heirs of defendant no.2 on record the plaintiffs filed an application under Order 22 Rule 4(4) of Code of Civil Procedure seeking exemption from bringing legal heirs of defendant no.2 on record and the said application was allowed. As a result of the same, neither original defendant no.2 nor his heirs are on record.

10. On these pleadings the trial Court framed issues. Both the parties adduced oral and documentary evidence. After considering the said evidence, the trial Court came to the conclusion that plaintiffs have proved their title to the suit property and the defendant no.1 is a trespasser and the suit filed, is in time. Naturally,he decreed the suit in plaintiffs' favour and passed decree for possession.

11. Being aggrieved by the above mentioned judgment and order the original defendant no.1 filed First Appeal No.831 of 1989, while, heirs of original defendant no.2 filed First Appeal No.970 of 1989. As both these appeals are arising out one and the same judgment, the same are

being disposed of by this common judgment.

12. In this appeal before me Shri Shaikh, learned Advocate for the defendant has urged 3 points. Firstly, he subedited that the Civil Court had no jurisdiction to try the suit as land in question was taken by the defendant no.1 on lease from defendant no.2 who was the original tenant of the suit land who had become the owner of the same on tiller's day. According to him it was in fact necessary for the trial Court to frame issue as to whether the defendant no.2 was a tenant under Bombay Tenancy and Agricultural Lands Act (hereafter referred to as the B.T. and A.L.Act). and to refer the same to the revenue authority. He therefore submitted that the City Civil Court had no jurisdiction and in the alternative the matter be remanded to the trial Court with a direction to frame issue regarding tenancy and refer it to the revenue authority. Secondly, he canvassed before me that the defendant no.2 was not at all served with the suit summons and suit could not have been decreed in plaintiff's favour. Thirdly,he argued before me that plaintiffs' suit is bared by law of limitation. While advancing this argument he also submitted that even if this Court holds that defendant no.2 is not a tenant of the suit land still he had become owner of the suit land by virtue of adverse possession. Hence on all these grounds he submitted that the appeal be allowed and the suit be dismissed.

13. Shri Kankaria,learned Advocate for the Appellants in First Appeal NO.970 of 1989 i.e. legal heirs of original defendant no.2 submitted that civil court had no jurisdiction to try the said suit as land in question was agricultural land and defendant no.2 was initially tenant in the suit land and on the tillers day he became the owner of the same. Thus, according to him the civil court had no jurisdiction to try the present suit. He, therefore, submitted that the appeal be allowed and decree passed by the trial Court be set aside.

14. As against this Shri M.P.S.Rao, learned Advocate for the plaintiff supported the judgment and order passed by the trial Court.

15. For the sake of convenience, it is desirable first to decide the point with regard to the service of the suit summons to the defendant no.2. At the outset it must be mentioned that there is no document showing actual physical service of summons to the defendant no.2. However, it is the case of the plaintiff that defendant no.2 was served by affixing a suit summons at his business place and accordingly affidavit of concerned person was also filed in the suit. Here it must be mentioned that the suit being very old, some of the documents and entries in Roznama are in fact not legible. However, if we peruse the documents of Roznama of 21-10-1969 there is entry wherein it is stated "Mr.Dinkar Rao for plaintiff, Mr.Shah for defendant no.1, defendant

no.2 absent". The very fact that the defendant no.2 is shown as absent indicates that the defendant no.2 was served but he remained absent. Shri Shaikh learned Advocate for the defendant no.1 strenuously argued before me that it was necessary for the learned trial Judge to satisfy himself about the service of suit summons to the defendant no.2 and to make specific endorsement that defendant no.2 is served. It is true that we do not find any such specific endorsement made by the learned trial Judge. However, the question arises whether merely because there is no such endorsement one can safely conclude that defendant no.2 was not at all served particularly when we find that all other facts an d circumstances clearly indicate that the defendant no.2 must have been served. So, merely because such particular endorsement made by the Judge is not available we cannot jump to the conclusion that the defendant no.2 was not served. Due weightage shall have to be given to the entries in Roznama which are duly made by the court during pendency of the suit. So, from these entries it appears that the defendant no.2 was served. However, curiously enough there is one entry which is dated 24-2-1965, which in fact shows entry "defendant no.2 not served, for service of writ summons upon defendant no.2 adjourned to 24-3-1965". So, this again creates some doubt as to whether defendant no.2 was in fact served or not but then again the entry in Roznama dated 4-11-1965 mentions "defendant no.2 absent and affidavit of service upon defendant no.2 is already filed". In fact the

record shows that as the defendant could not be served in the first instance, the plaintiffs sought Chamber order dated 15-9-1969 for serving the defendants by substituted service and such service was accordingly proved by the plaintiff by filing affidavit of M.B.Mayekar dated 19-10-1964 and affidavit of Gopal K. Kanchan, clerk, Registrar, City Civil Court, Bombay. The record also shows that 2 sealed packets containing true copy of Notice of Motion, plaintiffs' affidavit in support, true copy of the plaint and proceedings with endorsement order dated 19-8-1964 were sent to the defendants at the suit plot. The said Gopal Kanchan has annexed 2 documents of service of posting along with affidavit dated 19-10-1964. It is true that initially suit summons was taken on the residential address of the defendant no.2 but as a result of the preceipe filed by the learned Advocate substituted service was allowed on the business address of the defendant no.2. The record in fact shows that concerned court was vigilant to find out as to whether the defendant was properly served or not. and as initially the court was not satisfied, further service was directed and it is only after perusing the affidavit of N.S.Mayekar the court was satisfied that there was proper service by affixing the suit summons and accordingly the entry has been made in the Roznama. Even from perusal of the record it is clear that on 4-11-1965 the Court passed detailed order which is reflected in Roznama wherein it is clearly mentioned that the defendant no.2 is served as per provisions of substituted service. Thus I find that

the learned trial Judge proceeded with the matter only after getting himself convinced about the fact that the defendant no.2 is properly served as per the provisions of law.

16. There are numerous other circumstances which would also establish that defendant no.2 must have been served. Firstly, it must be noted that even defendant no.1 had not raised the point of non service of summons to the defendant no.2 in Notice of Motion No.1818 of 1980 taken out in the suit by the plaintiff. The contention raised by the defendant was that heirs of defendant no.2 have not been brought on record in time, thereby obviously suggesting that defendant no.2 is served but his heirs have not been brought on record. Much is made about the fact that at one point of time the heirs of original plaintiff had tried to suggest that defendant no.2 is in fact a fictions person, so, it does not lie in the mouth of plaintiff to say that defendant no.2 was served. No doubt this argument apparently seems to be attractive but if we carefully peruse the entire record and deposition of the plaintiff's witness then it appears that as he himself was not aware of original defendant no.2 and had never seen him, he was saying that there was no such person. However, merely from this one stray statement of the plaintiff's heir, we cannot hump to the conclusion that the plaintiffs are not entitled to contend that defendant no.2 was duly served, particularly when entries in Roznama clearly indicate that he was served.

17. There is another very important circumstance which also goes to show that the parties were in fact aware that the defendants.2 was served. Besides this, as a result of earlier orders passed in this behalf by this Court as well as by the Apex Court now it is in fact not open for the defendant no.1 or legal heirs of the defendant no.2 to contend that defendant no.2 was not served.

18. It is not in dispute that when the trial of the suit commenced and plaintiff examined 2 witnesses the defendant no.1 applied for production of supplementary affidavit and some documents. Apart from that document there was death extract of defendant no.2. From perusal of the said death extract it transpired that defendant no.2 died on 6-10-1971. Plaintiff therefore immediately called upon the defendant no.1 to give names of heirs of defendant no.2. However, defendant no.1 did not disclose the said names. Ultimately on 18-4-1980 the plaintiffs took out Notice of Motion NO.1818 of 1980. They asked for setting aside the abatement of suit against defendant no.2. Simultaneously, the plaintiffs also prayed that they may be exempted from substituting legal representatives of defendant no.2 in view of the provisions of Order 22 Rule 4(4) of Code of Civil Procedure. The said application was strongly opposed by the defendants. Even at that time it was not specifically contended by defendant no.1 that defendant

no.2 is not at all served and as such provisions of Order 22 Rule 4(4) are not applicable. Admittedly the said Notice of Motion was hotly contested and ultimately the same was allowed in terms of prayer clauses (b) and (c) by the trial Court. In other words, the plaintiff was exempted from bringing heirs of defendant no.2 on record having regard to the provisions of Order 22 Rule 4(4) of C.P.C. Admittedly, the said order was challenged by the defendant no.1 in C.R.A.no.1049/1980 and this Court (Coram:S.K.Desai,J) dismissed the same by passing very elaborate judgment.

19. The defendant no.1 challenged the said order passed by this Court in the Supreme Court in Civil Appeal No.1429 of 1982. However, the said appeal was also dismissed. Thus the order granting exemption to the plaintiffs from bringing heirs of defendant no.2 on record as per provisions of Order 22 Rule 4(4) of CPC was confirmed.

20. So, once this court and the Supreme Court have held that the order passed by the trial Court under Order 22 Rule 4(4) of Code of Civil Procedure is legal and correct, now it is in fact not open for the defendants to say that defendant no.2 was not served. This is obviously because the order under the above provisions was passed as basic essential requirement for passing the said order was fulfilled in the present case viz. defendant no.2 had failed to file written statement and

had also failed to appear and contest the suit at the hearing. In order to appreciate this position it would be worthwhile to see what Order 22 Rule 4(4) says. It runs as follows :

> 4(4)The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall; have the same force and effect as if it has been pronounced before death took place.

21. Now allowing the defendants to contend that the defendant no.2 was not served at all would in fact amount to negating the orders passed by this Court as well as by the Supreme Court. So, I have no hesitation to hold that now the defendants are not entitled to agitate the issue that defendant no.2 is not served. Shri Shaikh, learned Advocate for the defendants no.1 submitted that principle of res judicata would not apply to the present case. In order to substantiate this proposition he has placed reliance on a case reported at 1964 AIR SC 1993. I have carefully gone through the said ruling. Facts of the said case and the facts of the case in hand are quite different. Firstly, it must be noted that in that case

Their Lordships were not at all considering the question of application of Order 22 Rule 4 of c.p.c. More over the question was whether the order passed under Order 9 Rule 7 of Code of Civil Procedure can be challenged in subsequent proceedings and it was held that such order does not operate as res judicata in subsequent application under Order 9 Rule 13 of CPC. Here, in the present suit order under Order 22 Rule 4(4) of Code of Civil Procedure has been passed and the same has been upheld by the Apex Court. Point which was covered and considered while passing the above mentioned order is now again indirectly raised by the defendants in this very suit. So, it must be held that the defendants are now not entitled to raise the said contention.

22. Thus having regard to the all the facts and circumstances and material on record I have absolutely no hesitation to hold that there is no substance in the argument advanced by the defendants that original defendant no.2 was not at all served with the suit summons. The decree passed by the trial Court cannot be dismissed on that ground.

23. The next important point which has been contended by the defendant is that defendant no.2 was in possession of the suit land as a tenant and on 1-4-1957 i.e. on tiller’s day he became the owner of the suit land. The contention to this effect was taken by the defendant no.1 and as such it was necessary for the trial court to frame

issue with regard to the said contention and refer it to the revenue authorities as per provisions of B.T. and A.L.Act.

24. Both the learned advocates appearing on behalf of the defendants submitted that the trial Court did not even frame any issue with regard to the said contention and hence the matter be remanded back.

25. It is true that in the additional written statement the defendant no.1 had raised a plea that defendant no.2 was a tenant as per provisions of B.T. and A.L.Act. However,merely because the defendant no.1 had raised such contention it cannot be said that it was obligatory on the part of the trial to frame issue to that effect and refer the matter to the tenancy Court. Firstly, it must be noted that plea raised by the defendant was too vague.

26. In fact we find that the defendant no.1 has taken inconsistent pleas in this behalf. In one breath he has said that defendant no.2 had become the owner of the property by virtue of adverse possession and as such he leased out the suit land to him. While in another breath he says that defendant no.2 was a tenant and he become the owner on tiller’s day.

27. The learned advocate for the defendants have drawn my attention to various rulings to point out that once the issue with regard to the tenancy is framed the same

shall have to be referred to tenancy authorities for determining whether defendant is/was tenant or not. For this proposition there is no dispute but the main question is whether in the instant case there was necessity to frame issue as to whether the defendant no.2 is/was a tenant of the suit land. The learned Advocate for the plaintiffs submitted that there was no necessity to frame issue because the pleadings with regard tenancy were vague. In order to substantiate this proposition he has placed reliance on a case Pandur Dhondie Yerulkar V/s Ananda Patil **AIR 1975 Bom 52** wherein this Court has held that when a vague plea of tenancy is made the Court should hesitate for framing the issue with regard to tenancy. In the instant case, the defendant no.2 had not come before the court and contended that he is/was a tenant. Moreover, right from beginning the defendant no.1 had in fact contended that defendant no.2 was the owner of the property. It is only in additional written statement the defendant no.1 took a plea that defendant no.2 was a tenant. He has not given the details of tenancy and so the Court did not fill it necessary to frame issue with regard to tenancy. Not only that but we find that at no point of time the defendant no.1 submitted any application that the issues framed by the trial Court are not correct and the issue with regard to tenancy be framed. So, when there is no issue regarding tenancy, the question of referring the matter to tenancy authority does not arise.

28. From the evidence on record also it is clear that besides 7x12 extracts produced on record there was no other material to show that defendant no.2 is/was a tenant in the suit land. On the contrary there is one important document produced by defendant no.1 himself which gives death blow to the contention of the defendant no.1 that defendant no.2 is/was a tenant in the suit land. The defendant no.1 has produced the agreement executed between him and defendant no.2 by virtue of which he took the possession of the suit land. In that document it is nowhere stated by the defendant no.2 that he is a tenant in the suit land. On the contrary he says that he has become owner of the suit land by virtue of adverse possession. So, when defendant no.2 himself has not stated in the said agreement that he is a tenant it cannot be said under any circumstances of the case that defendant no.2 was tenant in the suit land.

29. The learned Advocate for the plaintiffs strenuously argued before me that in the instant case the parties had gone to the trial knowing fully well that the land in question is exempted from the application of the provisions of B.T. and A.L. Act and as such at no point of time the defendant no.1 moved the Court for framing issue with regard to tenancy. It was argued on behalf of the plaintiffs that by virtue of provisions under Section 88b of B.T. and A.L.Act notification was issued exempting the land in question from the operation of the provisions of B.T. and A.L. Act. It would be

worthwhile to see what Section 88(b) says. It runs as follows:

> (1) Nothing in the foregoing provisions except sections 3,4B, 8,9,9A, 9B,9C, 10, 10A, 11, 13 and 27 and the provisions of Chapters VI and III in so far as the provisions of the said Chapters are applicable to any of the matters referred to in the sections mentioned above shall apply -

(a) to lands held or leased by a local authority, or University established by law in the Bombay area of the State of Maharashtra) and

(b) to lands which are the property of a trust for an educational purpose, a hospital, panjarpole, Gaushala or an institution for public religious worship; provided that -

> (i) such trust is or is deemed to be registered under the Bombay Public Trusts Act, 1950, and
>
> (ii) the entire income of such lands is appropriated for the purposes of such trust;
>
> (c) to lands assigned or donated by any

person before the 1st day of August 1956 for the purpose of rendering any of the following services useful to the community, namely :-

maintenance of water works, lighting or filling of water troughs for cattle;

(d) to lands taken under management temporarily by the Civil, Revenue or Criminal Courts by themselves, or through receivers appointed by them, till the decision of the title of the rightful holders;

Provided that, from the date on which the land referred to in clause (d) is released from management, all the foregoing provisions of this Act shall apply thereto; but subject to the modifications that in the case of a tenancy, not being a permanent tenancy, which on that date subsists in the land -

(i) the landlord shall be entitled to terminate the tenancy under section 31 (or under section 33B in the case of a certificated landlord) within one year from such date; and

(ii) within one year from the expiry of the period

during which the landlord or certificate landlord is entitled to terminate the tenancy as aforesaid, the tenant shall have the right to purchase the land under section 32(or under section 33-C in the case of an excluded tenant) and

(iii) the provisions of section 31 to 31-D (both inclusive) (or sections 33-A and 33-B in the case of a certificated landlord) and sections 32 to 32-R (both inclusive) (or section 33-A and 33-C in the case of an excluded tenant) shall, so far as may be applicable, apply to the termination of a tenancy or the right to purchase the land, as aforesaid'

Provided further that -

(a) in the case of a permanent tenancy the permanent tenant shall be entitled to purchase the land held by him on permanent tenancy,-

(i) within one year from the date on which the estate or land is released from management, or

(ii) where such estate or land was released from management after the tiller's day but before the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1960 within one year from such commencement, and

(b) where such permanent tenant is desirous of exercising the right conferred on him under this proviso, he shall accordingly inform the landlord and Tribunal in the prescribed manner within the said period of one year and the provisions of section 32 to 32-R shall, so far as may be applicable, apply to the right of the permanent tenant to purchase the land)

(2) For the purposes of this section, a certificate granted by the Collector, after holding an inquiry that the conditions in the proviso to sub-section 91) are satisfied by any trust shall be conclusive evidence in that behalf.

30. The plaintiffs have also produced Notification issued under Section 88b which reads as follows :

In exercise of the powers conferred by clause (b) of section 88 of the Bombay Tenancy and Agricultural Lands Act, 1948 LXVII of 1948), and in supersession of Government Notification in the Revenue Department No.TNC 5156/101965-F, dated the 1st August 1956 the Government of Bombay hereby specifies -

(i) the area comprised in Greater Bombay immediately before the date

of the commencement of the Greater Bombay Laws and the Bombay High Court (Declaration of Limits)(Amendment) Act, 1956; and

(2) the areas within the limits of -

(a) the Municipal Corporations of the cities of Poona and Ahmedabad, and

(b) the Municipal Boroughs of Thana, Kalyan, Surat and Sholapur, as being reserved for non-agricultural and industrial development.

31. It is not in dispute that the land in question is covered by this Notification. So, once it is said that this Notification which is issued on 1-2-1957 is applicable to the land in question, then it cannot be said that the defendant no.2 had in fact become owner of the suit land on tiller's day i.e. 1-4-1957. The learned advocate for the plaintiffs has placed reliance on a case M/s Nilesh Construction Co. V/s Mrs. Gangubai and Ors **AIR 1982 Bom. 491** wherein Division Bench of this Court has held that once the notification under Section 88(1)(b) of B.T. AND A.L. Act is issued none of the provisions of the Act apply with retrospective effect to any area which has been specifically reserved for non

agricultural and Industrial Development and naturally civil court has jurisdiction with regard to the said land. He has also drawn my attention to a case Narayan Gopal Mhatre V/s Shankar Sontakke **1966 BLR 699** wherein the Division bench of this Court has observed that once action is taken under Section 88(1)(b) the protection given by the B.T. and A.L.Act is taken away.

32. In my opinion, in the instant case there is no evidence wortthename to say that the defendant no.2 is/was a tenant in the suit land, Defendant no.2 himself had not taken such stand even when he had entered into an agreement with defendant no.1. Assuming for the sake of argument that at one point of time he was a tenant still in any event as a result of issuance of the notification in pursuance of section 88(b) on 1-2-1957 there was no necessity to frame any issue with regard to tenancy. So, there is no substance in the argument advanced by the learned advocate for the defendant in this behalf when they submit that issue with regard to tenancy ought to have been framed or that civil court had no jurisdiction to try the present suit.

33. It was tried to be argued on behalf of the defendants that the defendant no.2 became owner of the suit land by virtue of adverse possession and present suit is barred by law of limitation. While considering this aspect here again it may be noted that the defendant no.2 has not come forward to prove his claim that he has

become owner by adverse possession.

34. From the deposition of the defendant no.1 it is very clear that he has in fact no knowledge about the possession of the suit land for the period prior to 1960. When such is the position it is very clear that the evidence of the defendant no.1 is of no use to show that the defendant no.2 was continuously in possession of the suit property for a period of 12 years by denying the title of original owner. There law of adverse possession is well settled. In order to show that the ownership is acquired by virtue of adverse possession, one has to establish that he is in possession openly, peacefully, continuously for a period of 12 years and that it is by denying the title of the real owner. However, no such evidence is forth coming in this suit and as a result of the same the learned Judge has also rightly held that defendant has failed to prove that defendant no.2 has become owner of the suit properties by virtue of adverse possession.

35. The plaintiffs has filed the present suit on the basis of title. So Article 65 of the Limitation Act is applicable in the instant case. So,the learned Judge has rightly held that the suit filed by the plaintiff is in time.

36. After careful scrutiny of the oral and documentary evidence on record and having regard to the position of

law, it is very clear that the learned trial Judge has rightly decreed the suit for possession in favour of the plaintiffs. There is no necessity to interfere with the said finding.

37. Hence both the appeals are dismissed with costs. The order passed by the City Civil Court, Bombay in B.C.C.Suit No.4411 of 1964 is confirmed. However time is granted till 30-6=-2006 to hand over possession of the suit property to the plaintiffs.

(S.R.SATHE,J.)